

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

RE/MAX REAL ESTATE  
PROFESSIONALS, INC., and TIM  
SOBROSKY,

Plaintiffs,

v

B & H GREEN ENTERPRISES, LLC, NEW  
LIFE ASSISTED LIVING CENTER, LLC,  
And AVS HOLDINGS 1, LLC,

Defendants.

No. 20-000588-CB-C30

**OPINION AND ORDER  
GRANTING DEFENDANTS'  
MOTION FOR  
RECONSIDERATION,  
MODIFYING ORDER DATED  
JANUARY 22, 2021, AND  
REOPENING CASE**

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At a session of said Court held in Lansing,  
Ingham County, Michigan, on May 4, 2021

PRESENT: Honorable Joyce Draganchuk  
Circuit Judge

Plaintiffs filed a 6-count complaint alleging breach of contract, promissory estoppel, fraudulent misrepresentation, innocent misrepresentation, unjust enrichment, and seeking injunctive relief. Plaintiffs subsequently filed a voluntary dismissal of the request for injunctive relief and dismissed AVS Holdings 1, LLC only as a party Defendant. All counts of the complaint are based on the same thing – a claim by Plaintiffs that Defendants promised to pay Plaintiffs a 2% commission on the sale of the New Life Assisted Living Center.

In lieu of an answer, Defendants filed a motion for summary disposition under MCR 2.116(C)(7) and (C)(8). Defendants' argument was that the contract that Plaintiffs'

complaint was based on was not in writing as required by the statute of frauds. Plaintiffs responded by arguing that there was a sufficient writing to satisfy the statute of frauds. Plaintiffs requested judgment in their favor under MCR 2.116(1)(2). Defendants filed a reply brief that stated that Plaintiff Sobrosky made misrepresentations about which party he represented, there was no mutual assent to form a contract, and partial performance could not correct the statute of frauds issue.

Oral argument was afforded to the parties and the Court made a ruling from the bench that granted Plaintiffs' request for judgment in their favor under MCR 2.116(1)(2). A written order was entered on January 22, 2021 that gave a money judgment to Plaintiffs against Defendants, jointly and severally, and closed the case. Defendants filed a timely motion for reconsideration under MCR 2.119(F).

In their motion for reconsideration, Defendants argue that Defendant Sabrosky misrepresented that Plaintiffs were an agent for the buyers in this transaction. Defendants also stated that "if allowed to be pled, the fraud defense and other available defenses" would result in a different outcome of this case. Defendants also asserted that there were genuine issues of fact as to (1) whether Plaintiffs were the procuring cause to the transaction, (2) whether Plaintiffs breached any fiduciary duties, and (3) whether the final order previously entered should have indicated joint and several liability.

The Court ordered a response to the motion for reconsideration. Plaintiffs response argued that Defendants' purported affirmative defenses were waived because they were not pled in the first responsive pleading or motion for summary disposition filed in lieu of a responsive pleading. Plaintiffs relied on *Baker v Marshall*, 323 Mich App 590,

595; 919 NW2d 407 (2018). In addition, Plaintiffs argued that the fraud, procuring cause, and fiduciary duty issues raised by Defendants were all meritless.

Defendants filed a reply to Plaintiffs' response without leave of the Court. Plaintiffs correctly filed an objection to the Defendants' reply. In Plaintiffs' reply, they expressly state for the first time that they are requesting an amendment under MCR 2.111(F)(3), which provides:

Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118.

Defendants also state that they have been denied the opportunity to plead affirmative defenses because their motion for summary disposition was denied and judgment was entered before they had the opportunity to file any pleadings.

Defendants' argument that they have been denied the opportunity to plead affirmative defenses is unavailing. Under MCR 2.111(F)(2), an affirmative defense must be asserted in a responsive pleading. In this case, Defendants *chose* to make a motion for summary disposition their first responsive pleading to the Complaint. Their affirmative defenses should have been asserted in their motion or at the very least in their reply to the Plaintiff's response to their motion, when it was evident that Plaintiffs were seeking judgment in their favor under MCR 2.116(I)(2). Asserting an affirmative defense in a motion for summary disposition is required by MCR 2.111(F)(2) and such a situation is expressly spelled out in MCR 2.111(F)(2)(a).

It is also inaccurate for Defendants to state "Plaintiffs did not request, or did they file a motion for summary disposition on Defendants' other available defenses not raised in the Motion for Summary Disposition." (Defendants' brief in support of motion for reconsideration, p. 2). Defendants made a procedural choice to proceed in this case with

a motion for summary disposition as their first responsive pleading. In response to that motion, Plaintiffs did not request a ruling as to any other available defenses because Defendants did not assert any other available defenses.

Defendants could have either asserted all defenses, including affirmative defenses, in their motion for summary disposition or Defendants could have filed an answer and affirmative defenses in response to the complaint and then proceeded with an early motion for summary disposition on the statute of frauds issue. Defendants also could have clearly stated in their reply to Plaintiffs' response to the motion for summary disposition that even if the Court were to find that there was a writing sufficient to satisfy the statute of frauds, a final judgment for Plaintiffs should not enter because there were defenses to the contract. Having exercised none of these procedural options, Defendants will not be heard to blame the Court or Plaintiffs for cutting off their defenses.

Nevertheless, Defendants make a request – not until their unauthorized reply to Plaintiff's response to Defendants' motion for reconsideration – that they be allowed to amend. A party's failure to set forth a valid statement of an affirmative defense in its first responsive pleading does not necessarily result in waiver of the defense. *Southeast Mich Surgical Hosp, LLC v Allstate Ins Co*, 316 Mich App 657, 663; 892 NW2d 434 (2016). Amendments under MCR 2.118(A)(2) shall be freely given when justice so requires but may be denied based on undue delay, bad faith or dilatory motive by the party seeking leave, repeated failures to cure deficiencies after previously allowed amendments, undue prejudice to the nonmoving party, and futility. *Kostadinovski v Harrington*, 321 Mich App 736, 743; 909 NW2d 907 (2017).

Plaintiffs argue that Defendants' request to amend should be denied based on futility. Plaintiffs point out lack of factual support and inconsistencies between the facts and the defenses proposed by Defendants. Plaintiffs also argue that if there is a contract, as the Court has ruled, then it does not matter whether Defendant Sobrosky was acting for the buyer or the seller.

The Court will briefly address Plaintiffs' points. First, in assessing futility the Court does not review the matter as it would a motion under MCR 2.116(C)(10). Rather, the Court ignores the substantive merits of the claim and reviews whether it is legally insufficient on its face. *PT Today, Inc v Comm'r of Office of Financial and Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006). Defendants have stated legally sufficient defenses. The Court does not at this stage look for factual support for those defenses.

Second, inconsistent defenses are acceptable. Now that the Court has found that there was a contract, Defendants may maintain the position (even though they don't agree there was a contract) that they should get relief because the contract was obtained by fraud. Likewise, Defendants may maintain that there was no agency relationship, but even if it was found that there is, there was a breach of fiduciary duty.

Third, even with the existence of a contract, it *does* matter who Defendant Sobrosky acted for because Defendants claim that he made false statements in that regard that induced Mr. Green to act as he did. Again, the Court does not assess the weight of that claim but only whether it is legally valid on its face.

The Court does not reverse its ruling that there was a contract that satisfies the statute of frauds and Defendants have not requested that. The Court also does not address the joint and several liability argument because it is not necessary at this point.

The Court does, however, amend the order entered on January 22, 2021 to delete Paragraph C and to delete the final order language. Defendants have 21 days after service of this Order to file an answer to the Complaint. Defendants are also directed to submit a new order that grants Plaintiffs' motion under MCR 2.116(I)(2) but does not grant judgment to Plaintiffs and does not close the case.

The Clerk is directed to reopen this case.

/S/

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Joyce Draganchuk (P39417)  
Circuit Judge

#### **PROOF OF SERVICE**

I hereby certify that I served a copy of the above Order Granting Defendants' Motion for Reconsideration upon the attorneys of record by email and by placing said document in sealed envelopes addressed to each and depositing same for mailing with the United States Mail at Lansing, Michigan, on May 4, 2021.

/S/

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Michael Lewycky  
Law Clerk/Court Officer